United States Court of Appeals for the Second Circuit



APPELLANT'S BRIEF & APPENDIX

76-2120

JULIA P. HEII

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES ex rel ERNEST WELCOME.

Petitioner-Appellant

LEON J. VINCENT, SUPERINTENDENT, GREENHAVEN CORRECTIONAL FACILITY.

Responden

BRIEF FOR PETITIONER-APPELLANT ERNEST WELCOME + APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES ex. rel. ERNEST WELCOME,:

Petitioner-Appellant,:

: 76-2126

ν.

LEON J. VINCENT, SUPERINTENDENT, GREENHAVEN CORRECTIONAL FACILITY,

Respondent.

PRELIMINARY STATEMENT

This is an appeal from an Order of the United States District Court (Weinfeld, J.) entered on September 2, 1976, dismissing without a hearing Appellant's application for a writ of habeas corpus pursuant to 28 U.S.C. §2254.

On September 15, 1976, Judge Weinfeld granted Appellant a Certificate of Probable Cause and permitted him to appeal in forma pauperis to this Court.

^{*}Said opinion is attached hereto as Appendix "E."

QUESTIONS PRESENTED

- 1. Whether Appellant was deprived of his due process right to a fair trial when the trial court refused to permit his counsel to question Alfred Cunningham, a defense witness, regarding his confression to the very same crimes for which Appellant and his two co-defendants were on trial.
- 2. Whether Appellant was deprived of his due process right to a fair trial by the admitted perjury of the prosecution witness (Vincent Turner), whose false testimony was induced as a direct result of the People's promise of leniency at his subsequent sentence on five separate robbery charges.

STATEMENT OF FACTS

Prior Proceedings

On March 10, 1970, Appellant was convicted in the Supreme Court, Bronx County (Gellinoff, J.S.C.) after a jury trial of two counts of murder and was sentenced to two concurrent terms of 25 years to life imprisonment.

The convictions were affirmed (without opinion) by the Appellate DIvision, First Department, on May 2, 1972 (39 A.D.2d 841) and on July 3, 1972, the former Hon. Adrian P. Burke denied Appellant's application for leave to appeal to the New York Court of Appeals. Thereafter, the Hon. Charles Brietel agreed to reconsider the denial of the leave application for leave to appeal to the New York Court of Appeals, providing that it was determined by that court that the court had jurisdiction to reconsider leave applications.

In the interim, Appellant moved in a motion dated May 21, 1973, in the Supreme Court, Bronx County, for a new trial pursuant to \$440.10(1)(g) of the New York Criminal Procedure Law on the ground that evidence discovered subsequent to his trial revealed that one Vincent Turner, a prosecution witness, had recanted his trial testimony and had admitted perjuring himself. Additionally, Appellant moved to vacate the judgment against him pursuant to \$440.10(1)(h) of the New York Criminal Procedure Law on the ground that his trial was tainted by the admitted perjury of a prosecution witness and that as a result, he was thereby denied his due process right to a fair trial as guaranteed

by the Fourteenth A end ent of the Federal Constitution. On November 7, 1973, Justice Sullivan denied Appellant's motion for a new trial, and on April 22, 1974, Justice Owen McGivern granted his application to appeal to the Appellate Division. However, on December 5, 1974, the Appellate Division affirmed without opinion Justice Sullivan's order. Justice Emilio Nunez dissented and granted Appellant permission to appeal to the Court of Appeals.

Thus, both the judgment appeal and the motion for a new trial were consolidated in the New York Court of Appeals. On September 24, 1975, the New York Court of Appeals unanimously affirmed Appellant's judgement of conviction and the Order denying the motion for a new trial.

Finally, on September 2, 1976, Judge Edward Weinfeld denied Appellant's application for a writ of habeas corpus. Facts

The charges in this case emanated from an incident occurring on November 2, 1967 at approximately 3:40 p.m. in the Katz Brothers' Realty office. Three armed men entered this office and thereafter shot and killed Seymour and Hyman Katz.

Accordingly, Appellant and his two co-defendants, Winston Holmes and Charles Gale, proceeded to trial on an indictment charging them with 2 counts of common law murder and two counts of felony murder.

The prosecution presented four eyewitnesses to the crime. Janet Lacorn was the only eyewitness to identify Appellant, and Dolores Marcell, who was not an eyewitness to the crime, allegedly bumped into Appellant on the street in front of the Katz Krothers' Realty store.*

JANET LACORN, an employee for Katz Brothers, testified that on the afternoon in question she heard the office bell ring at about 3:45 p.m., which meant that someone was in the waiting room who wanted to pay their rent or rent an apartment. At the teller's window, she saw a man standing in the waiting room who asked her about an apartment he had seen advertised in the paper. At that point, Hyman Katz came out of his office and said he would handle it (17,18).**

She returned to her desk, but a few minutes later, she heard

^{*}At the outset, it should be pointed out that the testimony of the eyewitnesses to the crime was particularly confusing, since instead of identifying the party they were referring to by name, the witness identified the men as Person No. 1, No. 2, etc. The efore, throughout it is very difficult to ascertain which defendant is being referred to.

^{**}Numerical references are to the pages of the trial transcript.

the bell ring again and when she reached the window she saw two other men in the waiting room. One of the newcomers was standing behind the first man so that she could not see his face (19). The second newcomer was leaning against the door on the side of the office. She was only able to observe him for 30 seconds (83). He was of average build, and was wearing a checkered or herring bone coat (88). This was the man she identified as Appellant (42). Mr. Katz then told her that he would take care of that individual so she again returned to her desk (19). She had her head down when she heard Hyman Katz holler for his brother for help. She looked up and saw a man poised with a gun in his right hand standing by the window sill in the office (20). She jumped up from her desk and one of her fellow employees told her to get down under the desk (23, 23A). When she looked back, she saw a second person holding a gun in the office proper (24). She hid under her desk, heard 4 or 5 shots fired, and when it was quiet, she got up and saw Seymour Katz lying on the floor bleeding, and Hyman Katz staggering into his office (24). Charles Gale was the man who had first entered the office with a gun (26).

According to Mrs. Lacorn, she identified Appellant in a lineup held some 5 weeks later (42). She was positive

that on November 12th, he had been wearing a checkered coat and no hat (707). She never saw Appellant with a gun in his hand, although she acknowledged testifying at the trial of Albert Cunningham that the second man (i.e., Appellant) had a gun (710).

DOLORES MARCELL testified that on the day of the incident she heard some girls screaming from the office in the next building, which was the Katz Realty office (134-5). She left her building and as she approached the entrance to the Katz building, she observed three men coming out of the doorway (136). She walked into these fellows, said "excuse me" and asked what had happened. She was informed by a white gentleman that "Seymour got shot." She turned to go back to her office and saw one of the fellows whom she had first bumped into, standing there. He told her that he was paying the rent upstairs and somebody got shot. She replied "You are not going into my office." Whereupon she went to her own office and locked the door. She identified Appellant as the man she had talked to. She was positive that Appellant had been wearing a dark coat and hat, and not a checkered coat (973). When she was asked in court to point to the man she had bumped into on the street, she first pointed to the co-defendant, Holmes, but then claimed that she had been mistaken (971).

This witness further stated that in a lineup held in the middle of December, she identified Appellant, who was among four black men participating in the lineup (141-159).

DETECTIVE FARRELL testified that no photographs were taken of the lineups in which Appellant participated (908). Additionally, all the DD-5 forms pertaining to the Lacorn lineup were missing (883). Although the DD-5 forms were made out in triplicate, all 3 copies were missing (884). Consequently, no one knew the date of this particular lineup. Moreover, the Detective's memo book regarding the investigation was "misplaced." (87)*

According to the Detective, Mrs. Lacorn had previously been shown photographs of Appellant, but she had not been able to identify him from the pictures (334). Even though Mrs. Lacorn selected Appellant from the lineup, he was permitted to leave the police station.

PATROLMAN THOMAS WHITE, who was at the scene of the crime after the murders, wrote the following descriptions of the perpetrators of the crime in his memorandum book:

^{*}Motions for a mistrial were made and denied by the court because of the unavailability of these documents.

"Shots fired by four unknown male negroes. Number one unknown male negro, 30 years, five feet six inches, 150 pounds, black trench coat, brown hat, a shotgun. Number two, unknown male negro, thirty years, five feet eleven inches, 160 pounds, dark jacket, black fedora, a small revolver. Number three and four unknown male negroes. No further descriptions." (632)

WALTER JOBA, a retired police officer, testified that on the day of the incident he interviewed Janet Lacorn (1176-77). His interview form revealed that she had told him regarding the second man "age unknown, smaller than the first man, wearing a dark coat, but I didn't get a good look at him. I ducked behind the middle desk. I may be able to pick the first man out from pictures but the second man I just got a glimpse of." (1177-78)

VINCENT TURNER testified that he has known Appellant for quite a few years (983). Around the 19th or 20th day of November, he saw Appellant in a poolroom and Appellant asked him if he had heard what had happened in the Bronx. He said "no," and Appellant stated "Them two studs that I burnt." (985). Immediately counsel moved for a mistrial, claiming that he had no knowledge that the People intended to use an

alleged statement from Turner and that Appellant should have had a separate hearing to determine the admissibility of his statement. Counsel also moved to strike Turner's testimony. The Court denied the motions. Turner then admitted that he had been convicted a four prior crimes - attempted grand larceny, two policy convictions, and robbery in the second degree. He was presently incarcerated in the Bronx awaiting sentence on five pending robberies. He knew that robbery carried a maximum penalty of 25 years. He denied that he had been promised anything in return for his testimony, but stated he did expect some consideration for it (989-90, 997-98).

Appellant presented three witnesses in his behalf who stated that at the time the crime was to have occurred, he was at his mother's home in the Bronx. First, LUCILLE WASHINGTON, Appellant's girlfriend, stated that she was with Appellant on the afternoon of the crime at his mother's house. Appellant was washing the walls in order to help clean the house for a party his mother was giving the next day (1037-38). At about 2:00 p.m., a friend of Mrs. Welcome's arrived, named Rita (1039). Another friend named Mildred came at about 4:00 p.m. MILDRED STANFIELD testified

that on November 2nd, she saw Appellant at his mother's house at about 4:00 p.m. (1077-78). She stayed at the house until 7:30 p.m., and Appellant was there the entire time. RITA BRITT, a Registered Nurse, testified that she came from Connecticut to Appellant's house to bring some potato salad for the party. She arrived there about 2:00 p.m., and saw Appellant there washing the walls (1160). She left the house about 3:30 p.m. (1141).

ALBERT CUNNINGHAM, also called as a witness in Appellant's behalf, testified that he had been indicted for the Katz killings (1194). On November 2, 1967, he drove to the Bronx with Branch and Greene, who had shotguns and pistols (1227). The three of them thereafter entered the hallway at 308 East 149th Street in the Bronx and robbed the Katz Realty office (1233). He did not know whether during the course of this holdup a shooting occurred (1224).

The court refused to permit counsel to enquire on direct examination into any statements made by Cunningham to any police officer or district attorney (1196). Counsel objected to this ruling, claiming that the defendants were charged with acting in concert with a fourth person who

was established to be Cunningham. Therefore, counsel argued that he was a co-conspirator and his statements should be admissible (1197-98, 1200). The court then ruled that counsel could question this witness regarding what he had observed and only if it became necessary, would counsel be permitted to confront him with prior contradictory statements (1200, 1216-18). In response, the district attorney argued that a party could only impeach its own witness' statement with a written statement signed by that person pursuant to N.Y.C.P.L.R. §4515 and C.C.P. §8-A (1208). The court refused to hold as the district attorney requested (1211).

Upon cross examination by the People, Cunningham denied robbing the Katz Realty office. He stated that he did not at first understand the questions put to him by Appellant's attorney. He thought that the attorney was talking about the confession. He acknowledged that he had been charged with the Katz killings, but therafter the charges had been dropped (1226).

When counsel on redirect sought to question Cunningham regarding his confession, the court refused to

permit this line of questioning. Counsel contended that since the district attorney brought forth the issue of the confession, the jury should understand why the charges had been dropped. Further, counsel argued that since inconsistent statements had been made by the witness, he should be entitled to use these statements to impeach the witness' credibility (1230, 1232). Appellant's counsel also pointed out that Cunningham's confession had been ruled admissible by Judge Murtagh (1235). The court, however, continued to refuse to allow counsel to ask any questions referring to the confession (1236). Appellant's counsel protested, stating that Cunningham had made a confession regarding this killing to Assistant District Attorney Vitale. In this confession, he had admitted his involvement and the involvement of two others, Branch and Greene, and on that basis, the District Attorney did in fact proceed to trial.

Burton Roberts, the District Attorney of Bronx

County, then appeared personally in court and informed the court that Cunningham could not have committed the crime, since it was revealed that Cunningham was an addict suffering from the symptoms of withdrawal and would have admitted to anything (1244-45). Cunningham was also alleged to have been the driver of the getaway car, and therefore could not

have been identified by anyone. Mr. Roberts stated that Cunningham had been given a lie detector test, and the test showed that he had nothing to do with this particular case. He commented, however, that he would oppose any lie detector test for Appellant, because the evidence against him was overwhelming. In this context, it must be noted that Appellant had continually asserted his innocence and had requested that a polygraph test be administered to him, even before the trial had commenced. Mr. Roberts did admit that Appellant was the only one who offered to take such a test (1246).

Appellant's counsel then informed the court that he had brought witnesses to Mr. Roberts' office that summer and he refused to investigate, whereas the District Attorney did conduct an investigation in the Cunningham case (1247). Mr. Cerbone, the Assistant District Attorney trying this case, merely replied that he did not conduct any investigation because he had not been impressed with the witnesses that Appellant's counsel had produced (1248).

Motion For a New Trial

Subsequent to Appellant's conviction, counsel

(Julia P. Heit) was able to procure new evidence not

previously available that Mr. Turner had recanted his

testimony, and had admitted perjuring himself at Appellant's

trial.

In a motion, counsel set forth the following facts:
In the middle of September 1972, Mrs. Emily Welcome, Appellant's mother, telephoned counsel to say that Mr. Turner had advised her (Mrs. Welcome) that he would be willing to discuss his testimony at Appellant's trial with Ernest's attorney. A meeting was then arranged, and on September 28, 1972, counsel went to the home of Mrs. Welcome, accompanied at this time by another attorney, RIchard Scheck.

At that time, Mr. Turner gave his permission for counsel to tape any conversation. Counsel proceeded to question him regarding his testimony at Appellant's trial.

Specificially, Turner admitted perjuring himself when he stated that Appellant had told him about the "two studs he had burnt in the Bronx." According to Turner,

he gave his testimony at the inducement of Charles Gale, who thought that Appellant might testify against him at the trial. Turner acknowledged that no threats or promises had been made that prompted this change of testimony and that he also was aware that he could be subjected to possible perjury charges because of his recantation. Finally, he stated that the prosecution played no part in inducing this testimony at the trial. In his written statement, Turner stated that he gave this false testimony because he thought it would help him on his pending sentences in the Bronx. (Transcripts of the tapes and Turner's written statements are attached hereto as Appendix "A.")

The District Attorney, in his opposing affirmation, asserted inter alia that Appellant's motion for a new trial should be denied since Appellant had failed to allege that the prosecution or the court knew the testimony to be false. The District Attorney also maintained that even if Turner's testimony was perjured, such perjury on the facts of this case constituted harmless error.

In answer to the District Attorney's contention that their office had no knowledge that the testimony was

false, counsel, in a reply affirmation, responded that Vincent Turner was a prosecution witness and at the time of his testimony was facing a total of 125 years imprisonment on various convictions obtained in Bronx County. Counsel pointed out that Turner had clearly stated at the trial that he had hoped for leniency in return for his testimony. By not sentencing Turner before he testified at Appellant's trial, a man in Turner's position had little to lose by fabricating a story against another man in order to have the People recommend a decrease in his sentence. According to counsel, since Turner was in fact a prosecution witness whose testimony was prompted because he expected consideration from the People on pending robbery charges against him, the People in this instance must bear the full responsibility for this perjured testimony, although lacking direct knowledge of the perjury.

Finally, Appellant in this reply affirmation, responded that Turner's perjury cannot be deemed harmless error on the facts of this case, since this admission could very well have been the "clinching" factor that prompted the jury to return a verdict of guilty against him.

On November 7, 1973, Justice Joseph Sullivan denied Appellant's motion for a new trial. (His written opinion is attached hereto as Appendix "B.") On December 5, 1974, the Appellate Division, First Department, affirmed without opinion Justice Sullivan's order (Justice Emilio Nunez' dissent is attached hereto as Appendix "C".) and on September 24, 1975 the Court of Appeals affirmed in a memorandum opinion the above order. (Said opinion is attached hereto as Appendix "D.")

Introductory Argument

At the outset, it is first necessary to analyse the evidence adduced against Appellant at his trial before proceeding to his constitutional claims of error. It is appellant's position that the evidence against him was so "unconvincing" that under no circumstance can the Respondent properly claim that this Court should apply a harmless error standard if it finds that errors of constitutional dimension were in fact committed during the course of the trial. Chapman v. Californía, 386 U.S. 18. In fact, it is important to note that Judge Weinfeld in his decision below at no time took issue with Appellant's analysis of the evidence, but instead focused his attention only on our constitutional claims.

An examination of this record shows that

Appellant's convictions of these most serious crimes

were predicated upon the vague, uncertain, and contradictory testimony of two of the People's witnesses, Janet

Lacorn and Dolores Marcell, and the totally unreliable

testimony of Vincent Turner, who candidly admitted that

he expected consideration in exchange for his testimony

against Appellant when sentenced on his five pending

robbery charges.

The only eyewitness to the crime, who identified Appellant was Janet Lacorn. She observed a man in a checkered or herring bone coat leaning against a door for only 30 seconds. Although at the trial almost two years later, she insisted that this man was Appellant, oddly enough, only a few hours after the crimes had occurred, Mrs. Lacorn was unable to give any description of this man to Detective Joba. In fact, she expressly told him that although she could perhaps identify the first man, she had grave doubts regarding her ability to identify the second man since the "second man I just got a glimpse of." (177-78) It is inconceivable that this witness, who could give the police no real description of the man alleged to have been Appellant only hours after the crime,

was able to so positively identify him in a lineup held more than a month later, especially when she previously failed to select Appellant's picture from a series of photographs shown to her by the police. In this context, what transpired at the lineup assumes critical importance. Yet, for some unexplained reason, all the DD-5 forms pertaining to this particular lineup had been lost, together with Detective Farrell's memorandum book regarding the investigation.

Dolores Marcell, although not a eyewitness to the crime, allegedly bumped into Appellant on the street in front of Katz Brothers' Realty store. In direct opposition to the testimony given by Mrs. Lacorn, this witness insisted that Appellant had been wearing a hat and a solid dark brown coat. Since neither Marcell nor Lacorn were able to give the police any specific facial characteristics of the man they claimed to have been Appellant, the fact that they both were so positive as to what this man had been wearing, and the fact that their testimony differed so materially on this point casts grave doubts as to whether Appellant was actually one of the men involved in the crime. Furthermore, Miss Marcell,

when asked to identify Appellant in court, pointed first to the co-defendant, Winston Holmes. Justice Nunez, in his dissenting opinion in the Appellate Division, aptly described the identification of these two witnesses by stating "The case against Appellant is weak and unpersuasive."

Finally, in order to bolster the highly questionable identifications by Marcell and Lacorn, the People presented Vincent Turner as a witness, who testified that Appellant had told him that he had "burnt two studs in the Bronx."

Notwithstanding that it is our position that this testimony is not only perjured, but that in any event it was so inherently unreliable that it should have been stricken from the record, it cannot be denied that this witness had a definite motive to fabricate his story. This was a man who testified that he had five pending robbery charges against him, and realized that he faced a maximum of 25 years on each charge. Therefore, he expected consideration for his testimony. The instinct for self-preservation must have surely outweighed any virtuous desire to tell the truth.

Such spurious testimony by Turner, coupled with the inconsistent and unreliable testimony of Miss Marcell and Mrs. Lacorn, constituted the People's case against Appellant.

Appellant, on the other hand, from the very outset, insisted that he was innocent of the crimes charged. He repeatedly requested that a polygraph test be administered to him. Although the People administered such a test to Alfred Cunningham, who actually confessed to the crimes charged, the People still refused to give Appellant this test, claiming that the evidence against him was overwhelming. While it is agreed that the results of the polygraph test may not have been admissible in evidence, nevertheless, it could have provided a further basis for investigation. And such an investigation was certainly in order in this case, since the People had actually proceeded to trial against one Alfred Cunningham before they realized that they allegedly had the wrong man. However, it is evident from this record that the District Attorney's office, for some reason, refused to conduct a thorough investigation of Appellant's claims of innocence. Appellant's trial counsel stated on the record that he had brought various witnesses in Appellant's behalf to the District Attorney's office for investigation. The only reason given by the People for their failure to investigate these witnesses' stories was Mr. Cerbonne's statement in court that he had been "unimpressed" with these witnesses. Consequently, the three witnesses who Appellant did in fact produce at trial, testified that at the time the crime was to have been committed, Appellant was at his mother's house preparing for a big party to be held the next day. These witnesses' testimony went entirely unrefuted. The People apparently never even bothered to check Appellant's story, or having checked it, could find no fault with it, but still chose to proceed to trial with their own weak case.

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Hence on reviewing the following errors complained of in the above context, it must be concluded that no harmless error doctrine can be applied to this case.

ARGUMENT POINT I

APPELLANT WAS DEPRIVED OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT REFUSED TO PERMIT HIS COUNSEL TO QUESTION ALFRED CUNNINGHAM, A DEFENSE WITNESS, REGARDING HIS CONFESSION TO THE VERY SAME CRIME FOR WHICH APPELLANT AND HIS TWO CO-DEFENDANTS WERE ON TRIAL.

Alfred Cunningham not only confessed to the crimes for which Appellant and his two co-defendants were charged, but the District Attorney's office actually proceeded to trial against him. It was thus imperative that Cunningham be questioned regarding the confession he had made and that the jury be permitted to determine its truthfulness. The trial court's refusal to permit any questions regarding the confession curtailed Appellant's examination of this witness and denied him his due process right to a fair trial.

Commingham admitted participating in the Katz incident with two men named Branch and Greene. On cross examination, however, this witness retracted his direct testimony, claiming that he thought that Appellant's counsel had been referring to his confession to the crime. When counsel then sought to

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question Cunningham regarding this confession, the court refused to permit any such questions, even after counsel had vigorously protested that the confession had been ruled admissible by Judge Murtagh at a <u>Huntley Hearing</u>, and that the People actually had proceeded to trial on the strength of this confession. By refusing to permit Appellant to question Cunningham regarding his confession, the trial court in essence stripped him of his right to present a most fundamental defense; <u>to wit</u>, to establish before the jury that another man committed the crimes for which Appellant now stood accused.

In <u>Chambers</u> v. <u>Mississippi</u>, 410 U.S. 284 (1973), the Supreme Court was confronted with an analogous situation. In <u>Chambers</u>, the defendant at his murder trial attempted to introduce the testimony of three witnesses whose proffered testimony was to the effect that one McDonald had confessed to committing the crimes for which the defendant was then on trial. The trial court barred this testimony as inadmissible hearsay evidence. Additionally, the defense, who called McDonald as its own witness, was precluded from questioning him as an adverse or hostile witness in regard to the circumstances of the repudiation of his confession. The court

justified its ruling on the theory that a party may not impeach his own witness. In reversing the conviction, the Supreme Court held:

"We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross examime McDonald, denied him a trial in accord with traditional and fundamental standards of due process." 410 U.S. at p. 313

The same result must be reached in the present case, as the trial court's rulings were far more restrictive than what had transpired in the <u>Chambers</u> case. In this case, the jury was not even permitted to hear Cunningham's confession, or learn the circumstances under which the confession was given, whereas in <u>Chambers</u>, McDonald's confession was at least introduced into evidence and the jury was made aware of the fact that another man had confessed to the crime. Mcreover, it must be pointed out that it was the District Attorney, in his cross examination of Cunningham, who first interjected the issue of the confession into this case. Once the District Attorney opened the door to this line of questioning, counsel on redirect certainly had the

right to question Cunningham further regarding the confession.*

Moreover, once Cunningham retracted his entire direct testimony, counsel should have been permitted to impeach the witness' credibility with reference to the confession as prior inconsistent statements. As noted in Chambers, the archaic rule that a party vouches for the credibility of his witness is indeed "primitive" and doomed to extinction. (N.Y.C.P.L.R.§4515, C.C.P.§8(A)). Courts are now far more interested in ascertaining the truth than having the truth suppressed by such outdated rules of evidence. Goodwin v. Page, 418 F.2d 867 (10th Cir., 1969); United States v. Norman, 518 F.2d 1176 (4th Cir., 1975); United States v. Goodlow, 500 F.2d 954 (8th Cir., 1974).

Finally, Cunningham's answers regarding his confession should have been admissible as a declaration against his penal interest. Although the Supreme Court in Chambers, supra, specifically left open the question of whether due process requires the discarding of the rule excluding

^{*}In this regard, Judge Weinfeld evidently was of the opinion that Cunningham's mention of his confession was spontaneously uttered by him, and that the People's cross examination of him did not open the door to that line of questioning. However, we submit that on this point the record speaks for itself. Moreover, once Cunningham interjected the issue of the confession into the case and especially when the prosecutor failed to make any motions to strike such statement, counsel at that point had every right to question Cunningham regarding his reputed confession.

declarations against penal interest, the court nevertheless found that said statements should be admissible in that case. The court reasonsed that McDonald's confessions were made under circumstances that "provided considerable assurrance of their reliability." 410 U.S. at p. 300.

In this particular case, Cunningham's confession bore far more indicia of reliability than did Chambers, and should have been heard by the jury. However, Judge Weinfeld, in denying Appellant the relief sought, predicated his opinion almost entirely on the conclusion that Cunningham's confession was unreliable. It is difficult to reconcile such a conclusion with the fact that the District Attorney of Bronx County obviously felt otherwise, as they actually proceeded to trial against this man on the strength of this confession. The court's finding that Cunningham was an addict who would have admitted to anything is equally unpersuasive on this record. Judge Murtagh, who must have been well aware of this factor and all the other circumstances surrounding the rendition of the confession, unequivocally ruled that Cunningham's confession was freely and voluntarily rendered. The defense would be hard-pressed to find a better indicia of reliability than Judge Murtagh's ruling, which was rendered

at the conclusion of a complete hearing on this very issue.

It must also be presumed that the District Attorney, before Judge Murtagh, had argued strenuously that the confession should be deemed admissible and Judge Murtagh, in finding as the People urged, must have rejected as lacking in merit the contention that Cunningham was under the influence of drugs at that time and would have admitted to anything. Certainly, it is blatantly unfair to allow the prosecution to twist the rules of evidence to suit its position in a particular case. And that is precisely what they did here. Having once argued that said confession was admissible and having obtained a court ruling to this effect, the People should not preclude the defense from likewise using this information. It is up to the jury, and not the prosecution, to determine whether under all the circumstances, Cunningham's confession was a truthful statement.

Moreover, we deem it blatantly unfair that the court below should accept as a criteria of reliability the fact that Cunningham passed a lie detector test. Such a ruling sanctions a double standard, since Appellant, well before the commencement of the trial, and even after the trial, stood ready, willing, and eager to take a polygraph test. Yet, for whatever reason, the People refused to administer the test to him, but would nevertheless ask this Court to take into consideration the fact that Cunningham passed the test. Appellant submits that these factors in and of themselves warrant the conclusion that Cunningham's confession must be deemed to have passed the test of reliability as set forth in Chambers v. Mississippi, supra.

Finally, irrespective of whether Cunningham's confession could be construed as vague or confused or whether he deliberately or mistakenly named as his two accomplices (Brance and Green) men who could not have committed the crime, the jury was still entitled to hear that another person actually confessed to said crimes. It was up to the jury to determine the trustworthiness of this confession after hearing all the evidence surrounding it. It cannot be overemphasized that Appellant presented a strong defense of alibi, and also vigorously attacked the sloppy police procedures in this case. Certainly, Appellant's due process right to a fair trial was seriously infringed upon, since the court's restrictive rulings made his defense

"far less persuasive" than it would have been had his opportunity to present this evidence not been so curtailed.

Accordingly, this Court should grant Appellant's writ of habeas corpus, since he was deprived of his due process right to a fair trial when the trial court refused to permit him to explore his accusations that another man committed the crime for which he was then on trial.

POINT II

APPELANT WAS DEPRIVED OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY THE ADMITTED PERJURY OF THE PROSECUTION WITNESS (VINCENT TURNER), WHOSE FALSE TESTIMONY WAS INDUCED AS A DIRECT RESULT OF THE PEOPLE'S PROMISE OF LENIENCY AT HIS SUBSEQUENT SENTENCE ON FIVE SEPARATE ROBBERY CHARGES.

At the outset, it must be noted that this is not the classic case where it is alleged that the prosecution knowingly or deliberately, or even negligently, offered perjured testimony. Giles v. Maryland, 386 U.S. 66 (1967); United States v. Giglio, 405 U.S. 151 (1972). Instead, this case presents the novel issue of whether the prosecution's practice of allowing witnesses who are awaiting sentence on

on their pending sentences in exchange for their trial testimony, encourages perjured testimony. It is Appellant's position that in this case such a practice did induce Vincent Turner to perjure himself and accordingly, the People must now be held accountable for such perjured testimony.*

At the time of Petitioner's trial, Vincent Turner, a man with a long criminal record, was facing a total of 125 years imprisonment on pending robbery charges and frankly admitted that he expected consideration in exchange for his testimony.

Unquestionably, a man in Turner's position has little to lose by fabricating a story against another man

^{*}Even before it was known that Turner would recant his trial testimony, it was argued before the Appellant Division on Appellant's judgment appeal that Turner's testimony, which was given only because he expected consideration from the District Attorney's office on pending robbery charges against him, must be deemed unreliable as a matter of law and should have been stricken from the record.

in order to have the People recommend a decrease in his sentence. The People are in effect permitted to utilize the vast power of their office to induce witnesses such as Turner to give testimony under such circumstances. Such a practice not only encourages perjured testimony, but thwarts the very purpose of the trial itself -- that is a search for the truth. It is highly unlikely that the truth would or could emerge from a witness who, but virtue of the bargaining power of the People, has so much to gain by favorably testifying for the People, and so little to lose.

It is no answer to this argument to conclude that counsel had a full opportunity to cross examine

Turner at trial. Even the most skillful cross examination could not have forced this witness to change his story, since defense counsel obviously could not offer him the incentive that the prosecution could.*

^{*}By presenting such an argument, Appellant is not contending that witnesses such as Turner should not be permitted to testify. Appellant is contending, however, that if the People intend to use such testimony and consider it vital to their case, the far better and fairer practice would be for the witness to be sentenced on his pending charges before he is to give his proffered testimony. If this were the case, the witness could then be cross examined extensively to determine the true nature of the bargain and to determine the exact consideration, if any, that he received for his testimony. But more important, the threats of perhaps a heavier sentence being imposed upon this witness, if his testimony should be favorable to the defendant, would be removed, as would any incentive to fabricate a story.

While admittedly, the prosecution might not have had direct knowledge of Turner's perjury, nevertheless they still must be held accountable, since Turner was their witness and it was their prosecutorial practice that induced Turner to so testify.

Moreover, it cannot be denied that Turner's testimony played a crucial part in the prosecution's case, for it in effect constituted an admission from Appellant's own lips that he had committed the crimes charged, and such an admission is the most damning type of evidence that can confront a defendant. The only other evidence connecting Appellant with the crimes charged was the vague, uncertain and contradictory testimony of the two People's witnesses, Janet Lacorn and Dolores Marcell.

Thus, it is clear that the prosecution used the testimony of Turner to bolster the highly questionable identifications by Marcell and Lacorn, and without his testimony, it is unlikely that a conviction could have been obtained.

The court below assumed that Turner's testimony was indeed perjured, but nevertheless chose to adhere to

the traditional viewpoint that there must be some showing of prosecutorial misconduct before relief can be granted. Once the court accepted the basic premise that Turner perjured himself at Appellant's trial, it was incumbent upon the court to hold the People accountable for this tainted testimony, since it was the prosecutorial practice of eliciting such testimony in exchange for the lenient sentences that would thereafter be imposed on the willing "perjurer." Moreover, contrary to the court below, our argument does not in any way restrict the prosecutorial use of informants, accomplices, etc. However, in order to preserve the integrity of our trial proceedings, protection must be afforded those defendants who are victimized by the perjured testimony which in turn was prompted by the well entrenched prosecutorial practices.* If the prosecution choses to use such witnesses, they must take the risk and bear the full responsibility if it is subsequently discovered that their witness in fact perjured themself in order to ingratiate himself with the prosecution at the time of his sentence.

^{*}In his written statement, Turner admitted outright that one of the factors prompting his perjured testimony was his hope for a lenient sentence.

Furthermore, it is somewhat irrelevant to argue regarding who bears the responsibility for the perjured testimony in this case. Perjured testimony, whether at the instigation of the prosecution, or attributed solely to the witness, is still perjured testimony, and to permit a conviction to be predicated upon perjured testimony offends the dignity of the judicial system itself.

In an analogous case of Mesarosh v. United States, 352 U.S. 1 (1956), the Supreme Court stated "The dignity of the United States Government will not permit the conviction of any person on tainted testimony." 352 U.S. at p. 7. Hence, our courts should not give judicial approval to a conviction which is based in large part on perjured testimony.

In <u>Mesarosh</u>, it was the Solicitor General who acknowledged the unreliability of the Government's witness, but specified that it was unprepared to state that the witness had perjured himself. Nevertheless, the Government was still candid enough to at least request a hearing, although they played no part in inducing the suspected testimony. Commending the candor of the United States, the Supreme Court stated:

"The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boaSts. This Court is charged with supervisory functions in relation to the proceedings in the federal courts . . . Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." 352 U.S. at pp. 9, 10

See also <u>United States v. Chisim</u>, 436 F.2d 645 (9th <u>Cir.</u>, 1971) (where defendant brought the perjured testimony to the attention of the court)

Similarly, this Court in the pursuit of justice should accord Appellant the relief sought, since there is no dispute that his conviction was tainted by the perjured testimony of Vincent Turner, a prosecution witness. See <u>United States v. Flynn</u>, 130 F.Supp. 412 (D.C.N.Y., 1955); <u>United States v. Nolts</u>. 440 F.2d 1124 (5th Cir., 1971).

CONCLUSION

FOR THE ABOVE STATED REASONS THE PETITION
FOR A WRIT OF HABEAS CORPUS SHOULD BE GRANTED

Dated: New York, New York October 22, 1976

Respectfully submitted,

JULIA P. HEIT 142 East 16th street New York, New York 10003 (212) 777-8242

APPENDIX A - TRANSCRIPT OF TURNER'S RECANTATION

TESTIMONY FROM VINCENT TURNER

TAPE RECORDED ON SEPTEMBER 28, 1972

Re: ERNEST WELCOME

My name is Julia Heit, I am an attorney with The Legal Aid Society, Criminal Appeals Bureau at 119 Fifth Avenue, New York, New York.

I am at the home of Mrs. Welcome. The exact address of Mrs. Welcome is (what's your exact address) 2410 Eighth Avenue. I am here to talk with Vincent Turner who gave testimony against Ernest Welcome at his 1969 trial.

Umn, Mr. Turner please tell us the testimony that you gave against Ernest Welcome.

(Mr. Turner starts talking)

Heit: Would you give us your name and address?

Turner: My name is Vincent Turner, I live at 2228 7th.

Avenue, Apt. 18. And uh, now I work as a barber. Uh, I uh

testified against Ernest Welcome at his in '69, 1969 and uh

my testimony was false. I did it to try to help the others that was involved in this case.

Heit: What did you testify to?

Turner: My statement was made, uh that was said was that uh, that Ernest had told me about this uh, killing that had happened, (pause) that he had (yeah) that he had uh burnt two guys in the Bronx. The two Katz brothers, I uh believe that is the name and uh this is not true and uh one of his codefendants had told me to say this here.

Heit: Do you know his name?

Turner: Charles Gail, to make things easier on the uh, on the rest of them.

Heit: Um, you say to make things easier on the rest of them? What did you mean by that statement? Why would your

Turner: They had felt uh, that Ernest had wanted to testify against them. So before he can, they came to me and said they wanted me to testify against him. Uh.

Heit: Did they tell you that Ernest had some information regarding the crime or you don't know?

Turner: No, I don't know anything about that.

Heit: Let me just reiterate. You testified at Ernest
Welcome's trial that Ernest in a pool room, uh a few weeks
after the trial, a few weeks after the mim crime was committed
told you did you hear about the two studs that I burnt in the
Bronx? Was this testimony true?

'lurner: No.

Heit: This testimony was not true. Ah Did the prosecution play any part in inducing this testimony?

Turner: No.

Heit: You gave this false testimony solely because of your conversations with Charles Gale in an effort to help Charles Gale and Winston Holmes?

Turner: Yes.

Heit: Yes, uh Mr. Turner, have you ever met me before this evening?

Turner: No.

Heit: Did I make any threats to you?

Turner: No.

Heit: Did I make any promises to you?

Turner: No.

Heit: Uh. Did I only say that if something --- Did I in fact tell you that you would be possibly subjected to perjury charges because of this?

Turner: Yes.

Heit: Did I tell you that your parole would be violated if in fact you were subjected to uh perjury charges because of this?

Turner: Yes.

Heit: You are still willing to make uh this statement"

Turner: Yes.

Heit: Ah. Is there anybody in the room with me that is threatening you?

Turner: No.

Heit: Uh. Has anybody threatened you on the street, does any body know on the street of the fact that you testified against Ernest Welcome?

Turner: No.

Heit: Did anybody threaten you at anytime or told you --

Turner: No.

Heit: You know that you should try to retract this?

Turner: No.

Heit: Mr. Turner at Sing Sing Prison, uh did you in fact give Mr. Welcome an affidavit?

Turner: Yes.

Heit: Uh. What did you say in this affidavit?

Turner: That my testimony was - uh false and I uh really don't quite remember right now.

Heit: Did you sign this affidavit?

Turner: Yes.

Heit: Did you have this affidavit notarized?

Turner: Yes.

Heit: You had this affidavit notarized ... Ah ...

(lull in tape)

Scheck: My name is Richard Scheck, I am assisting

Julia Heit, I am an attorney. I'm living at 104 East 17th

Street.

Heit: This is a recording. The date this recording has been made is September 28, 1972. Ah at approximately 8:30 uh p.m. Ah...

4/28/72 A9 and state a the following Statement to be true of for far 1970 of 1970 to bonery property East, Justice me Topic follow of top for the Brown the Brown of the Brown They any at these thing which Masser for the Masser for the Man of way for the self of the token for stay have gett suggested, the taken for the stand against them then the stand against them. The stand of the stand against them the plant of the stand and the horner. Thicent Spenier Jolea P. Hert notary Public, State of Ken yel no 31-1744620 Commission Elpers Frank 36,1923 BEST COPY AVAILABLE

(39 A D 2d 841) and on June 6, 17% leave to appeal to the Court of Appeals was denied.

Defendant Welcome now moves to vacate the judgment of conviction on the ground of newly discovered evidence (CPL Section 440.10 (1) (g), and (1) (h). The claim is based on an affidavit and transcript of a tape recording by a prosecution witness, Vincent Turner, who now states that he testified falsely at the trial.

At trial, Welcome was identified as one of three participants in the crimes charged in the indictment. Turner's testimony concerned an admission allegedly made by Welcome about three weeks after the commission of the homicides. Turner, who was awaiting sentence on a robbery conviction at the time, testified that although he was not promised anything in return for his testimony as a prosection witness, he did expect some consideration.

Welcome makes no claim that the prosecution knew of the alleged falsity of Turner's testimony. Hence, there is no issue of perjured testimony knowingly used by the district attorney. Under such circumstances, post conviction relief is not available (Feople v. Oddo, 300 N Y 649) and movant is not entitled to relief under CFL Section 440.10 (1) (b) on the grounds that the judgment was produced by misrepresentation or from on the part of the prosecutor.

Appendix B - Justice Sullivan's Opinion Denying
Appellant's Motion for A New Trial

Three and one-half years have clapsed since the trial which was held the beginning of 1970. Under CIL Section 440.10 (1) (r), newly discovered evidence is such "which could not have been produced by the defendant at the trial even with a character is to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence ifter the discovery of such alleged new evidence".

The fact that the claim of newly discovered evidence is based on information unearthed three and one-half years after the date of the trial is no bar to the relief sought. No longer is there a statute of limitation on the claim of newly discovered evidence (see Practice Commentary, CPL Section 440.10, McKinney's Consolidated Laws, Book 11A, p. 183) which formerly had to be raised within one year of judgment (CCF Section 466).

It should be borne in mind that Turner was examined and cross-examined at creat length regarding his motive in testifying. He now ascribes his allered false testimony to the fact that the co-defendants felt that Welcome was going to testify against them and. inasmuch as he, Turner, wished to help the co-defendants, hetestified adversely to Welcome. This reason, advanced as it is three and one-half years after the event, is somewhat self-contradictory insofar as Welcome is concerned. His trial posture s that he has nothing to so with the addition and me affected all bi witnesses to that before. It, as the co-defendants allegedly thought, acleone would become a proceedings after secretarily early have to appeal attended in

Appendix B - Justice Sullivan's Opinion Danying Appellant's Motion for A New Trial

Par recent cule post inite to a nation one tree to the lon newly at comme evidence too been tried or follows:

"... a new trial will not be created where the proofs tend only to impeach or discredit a witness who was sworn upon the trial"

(leople v. Decker, 215 N.Y. 1.6, 159, 160; leople v. McCarthy, 256 App. Div. 522, 525, aff'd sub nom. Feople v. Kearns, 280 N.Y. 263). Here, the witness nimself is attempting to impeach his prior testimony. Turner's present offer of proof is not "of such character at to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant ***." On the basis of his present stance, Turner, in fact, never would have testified at the trial.

Considering the reason given for Turner's alleged perjury at trial, alluded to above, which certainly is inconsistent with Welcome's claim of innocence, and the fact that he was identified to the jury's satisfaction as being a participant in the crime, the court finds there is no basis, warranting the exercise of its discretion, to order a hearing on this issue (leople v. Dinan, 19 A D . d 786, aff'd 11 K Y 2d 350).

As for movement's claim to relief under Section 440.10 (1) (h), even where perjured testimony is given on the trial, it is only where the prosecutor had knowledge, or knowledge is imputed to him, that the defendant tools be entitled to a vacitar of the interment (icople v. Sobertson, 1977 1991).

Appellant's Motion for A New Trial

In this case, it is conceded that the district
attorney had so knowledge of Turner's alleged false testimony. Comm nobis does not
lie to vacate a conviction obtained by proof
which at the time of trial was deemed to be
constitutional evidence (Feople v. Bofill,

37 hise 2d 167)

The motion is denied in all respection

APPENDIX - ORDER OF APPELLATE DIVISION AFFIRMING WITHOUT OPINION APPELLANT'S MOTION FOR A NEW TRIAL AND DISSENT OF JUSTICE NUNEZ

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December , 1974

Present-Hon. Owen McGivern, Arthur Markewich, Emilio Nunez, Daniel E. Macken, Presiding dustice,

Juntices.

The People of the State of New York,

Respondent,

-against-

Ernest Welcome,

. .

Defendant-Appellant.

1532

An appeal having been taken to this Court by the defend int-appeal limit

from the order

of the Supreme Court, brong County

(Sullivan, J.), entered on November 7, 1973, denying, without a hearing, defendant's motion to vacate the judgment of conviction as sinst him
by said court, rendered on March 10, 1970,

and said appeal having been argued by Mck. Julia F. Hell

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Appendix # - Order of Appellate Division Affirming Without Opinion Appellant's Motion for a New Trial and Dissent of Justice Nunez

of counsel for the appellant , and by MX Jane Bilus Gould

of counsel for the respondent ; and due deliberation having been had thereon.

It is pnaningusty ordered that the order

so appealed from be and the same is hereby affirmed. [Nunez, J., dissents in a memo-randum.]

EUTER:

clerk.

McGivern, P.J., Markewich, Nunez, Macken, JJ.

The People of the State of New York, Respondent,

J.B.Gould

-against-

Ernest Welcome,

Defendant-Appellant.

J.P.Heit

Order, Supreme Court, Bronx County (Sullivan, J.), rendered on November 7, 1973, affirmed.

Nunez, J., dissents in a memorandum as follows:

• I would reverse and grant the motion to set aside the verdict on the grounds of newly discovered evidence to the extent of remanding the matter for a hearing.

Convicted of murder after trial, Ernest Welcome is serving a sentence of 25 years to life. Defendant stead-fastly asserted his innocence, asked for a polygraph test which was denied, and presented an alibi defense supported

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Appendix Co- Order of Appellate Division Affirming
Without Opinion and Appellant's Motion for a New Trial
and Dissent of Justice Numez

by three witnesses who stated that at the time the crime was committed he was at his mother's house. The People called one Vincent Turner, who at the time was facing five separate robbery charges. He testified that about two weeks after the commission of the crime he met Welcome in a pool hall. Welcome asked him if he heard what happened in the Bronx. Turner replied no, and Welcome stated "them two studs that I burnt." Turner has now recanted. He states that he perjured himself when he testified that appellant told him about the two studs that he had "burnt". Turner's testimony aside, the case against appellant is weak and unpersuasive. The only other evidence connecting appellant to the crime is the identification of Ms. Laccorn and Ms. Marcell. These two witnesses did not agree as to what Welcome was wearing at the time of the crime. Laccorn, the only eyewitness against defendant, could not describe Welcome to a detective a few hours after the crime and did not select his photo from a group displayed to her. She said she had just "got a glimpse of" defendant. Marcell said she bumped into Welcome on the street in front of the premises where the crime had been committed. In direct opposition to Ms. Laccorn, she testified that defendant

Appendix C - Order of Appellate Division Affirming Without Opinion Appellant's Motion for a New Trial and Dissent of Justice Nunez

had been wearing a hat and a solid dark coat and when asked to identify defendant in court, she first pointed to a co-defendant

In <u>Giglio v. United States</u>, 405 U.S. 151 (1972) the Supreme Court at page 154 said:

"A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the jungment of the jury"

See also <u>People v. Priori</u>, 164 N.Y. 459 (1900). Defendant has met all the requirements of 5440.10(1)(g) of the Criminal Procedure Law entitling him to a hearing. If it is found that Turner, a key witness for the People, perjured himself at trial, it may very well follow that he is entitled to a new trial.

Order filed.

APPERIDIA DE COURT OF APPENDE DE LA PROSENTA

State of New York Court of Appeals

MEMORANDUM

1 No. 432
The People &c., Respondent,
vs.
Ecnest Tolcome, and
Winston Holmes,
Appellants.

This memorandum is uncorrected and subject to vision before publication in the New York Rep.

(432)

Julia P. Heit, N.Y. City, for appellant Ernest Welcome.

Arnold E. Wallach, N.Y. City, (Michael S Washor of counsel) for appellant Winston Holmes.

Mario Merola, District Attorney, (Jane Bilus Gould of counsel) for respondent.

MEMORANDUM

Both defendants appeal from orders affirming their convictions.

In addition, the defendant Welcome appeals from an Appellate Division order affirming an order of the trial court denying a motion for a new trial.

As regards the latter appeal in the case of <u>People v. Welcome</u>, the order denying the motion for a new trial was properly affirmed by the Appellate Division. By statute (CPL & 440.10[1][g] and [h]) a motion of this nature is addressed to the discretion of the trial judge. Under all the circumstances of this case - taking into account the nature of the trial proof, the substance of the witness' testimony and the circumstances surrounding the alleged recantation, which were fully developed in the moving papers - we cannot say that the trial judge abused his discretion in denving the motion without a hearing (<u>People v. Shilitane</u>, 218 N. Y. 161).

The remaining appeals in both cases should be dismissed. In criminal cases there is no appeal as of right unless the death penalty has

"the appellant must make application pursuant to § 460.20 for a certificate granting leave to appeal to the court of appeals" (CPL § 460.10 [5][a]).

When the application is submitted to this court, current law requires that it be made to the Chief Judge who "must then designate a judge of such court to determine the application" (CPL § 460.20 [3][b]). The decision of the judge so designated must be considered final (People v. Kahn, 291 N. Y. 663; People v. McCarthy, 250 N. Y. 358, 362; Cohen and Karger, Powers of the New York Court of Appeals, p. 718, fn. 70). Moreover, the application for reconsideration in the Holmes case was made fourteen months after denial and nearly a year after the judge, originally designated, had left this court.

Similarly, in the <u>Welcome</u> case, the application was made nearly two years after denial and three months after the judge who originally denied leave, had left this court.

* * * * * *

On defendants' appeals from orders of the Appellate Division, First Department, which affirmed judgments of conviction.

Appeals dismissed.

On defendant Welcome's appeal from an order of the Appellate Division. First Department, which affirmed an order denying a metion for a new trial

Order affirmed

Memorandum. All cencur

Decided September 24, 1975

State of New York

Court of Appeals

Decisions

SEPTEMBER 24, 1975

CASE

1 No. 432
The People &c., Respondent,

vs.

Ernest Welcome, and
Winston Holmes.

Appellants.

On defendants' appeals from orders of the Appellate Division, First Department, which affirmed judgments of conviction:

Appeals dismissed.

On defendant Welcome's appeal from an order of the Appellate Division, First Department, which affirmed an order denying a motion for a new trial:

Order affirmed.

Memorandum. All concur. APPENDIX E

JUDGE WINFELD'S DECISION

E1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



ERNEST WELCOME,

Petitioner,

-against-

76 Civil 1562

LEON J. VINCENT, Superintendent, Green Haven Correctional Facility,

OPINION

,C

Respondent.

45040

JUDIA P. HEIT 142 Hast 16th Street New York, New York

Attorney for Petitioner

HON. LOUIS J. LEPKOWLTH Attorney General of the State of New York Two World Trade Center New York, New York

Attorney for Respondent

JOSEPH W. HENNEBERRY
Assistant Attorney General
Cf Counsel

L'DWARD WEINPELD, D.J.

petitioner, now serving a sentence of twentyfive years to life imprisonment in Green Haven Correctional Facility in Stormville, New York, seeks his
release on a federal writ of habeas corpus. He claims
he was denied his right to a fair trial under the
Fourteenth Amendment by the refusal of the trial judge
to allow him to examine a defense witness as to a
confession previously made by that witness, and by the
alleged perjury of another witness.

victed of two counts of murder on March 10, 1970, after a jury trial in the Supreme Court of the State of New York. His conviction was affirmed without opinion by the Appellate Division, First Department on May 2, (1) and leave to appeal, although initially denied by Judge Burke of the Court of Appeals, was granted by Chief Judge Breitel on March 7, 1974.

In the interim patitioner moved, on May 21, 1973, for a new trial and vacatur of the judgment of

^{(1) 30} App. Div. 2d 941, 331 N.Y.S.2d 995.

based upon the post-trial recantation conviction, of a prosecution witness. The motion was denied by the Supreme Court without an evidentiary hearing on November 7, 1973. The Appellate Division affirmed the denial of petitioner's motion on December 5, 1974, with one judge dissenting and granting permission to The direct appeal appeal to the Court of Appeals. from the judgment of conviction and the appeal from the denial of petitioner's motion for a new trial were consolidated in the Court of Appeals, which dismissed the direct appeal and affirmed the denial of the motion for a new trial on September 24, 1975. It is not disputed that petitioner has exhausted his available state remedies.

The crime of which petitioner was convicted was the murder, on November 2, 1967, of Hyman and

⁽²⁾ See N.Y.C.P.L. SS 440.10(1)(g) and (h).

^{(3) 46} App. Div. 2d 860, 361 N.Y.S.2d 378 (1st Dept.).

^{(4) 37} N.Y.2d 811, 375 N.Y.S.2d 573, 333 N.E.2d 828.
The Court of Appeals dismissed petitioner's direct appeal on the ground that Chief Judge Breitel had no authority to grant leave to appeal after Judge Burke had denied it, and that therefore the case was not properly before the court.

and Seymour Katz, during a robbery at their real estate office in the Bronx by three men. Petitioner and his co-defendants proceeded to trial under an indictment which charged them and a fourth unnamed person in two counts with common law murder and in two counts with felony murder. The case against petitioner was based on the testimony of three witnesses. Janet Laccorn, an employee of the Katz brothers, was present when the robbery and shooting occurred. She identified one of the robbers, whom she had observed for about thirty seconds, as petitioner. Dolores Marcell, who worked in a store on the street floor of the same building, tagtified that she came outside when she heard Loreaning from the Katz brothers' office. She identified petitioner as one of three men she encountored on the street as they ware leaving the building from the en'rance to the Katz brothers' office. Both

141

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⁽⁵⁾ Since there is no dispute as to the essential facts of the case, no evidentiary hearing need be held.

United States ex rel. Rice v. Vincent, 401 F.2d

1326, 1331 n.3 (2d Cir.), cort. denied, 419 U.S. 830

(1974); United States ex rel. Randarzo v. Follette,

282 P.Supp. 2, 3 (S.D.H.V. 1968), remanded on other

grounds, 444 F.2d 625 (2d Cir.), cert. denied, 40;

U.S. 016 (1971); see Procumier v. Archley, 400 U.S.

446, 451 (1971).

though Marcell initially pointed to one of petitioner's co-defendants instead of petitioner, in court as well.

Vincent Turner testified that about three weeks after the robbery he was approached in a pool room by petitioner, who asked Turner if he had heard what had happened in the Bronx, and referred to "[t]hem two studs that I burnt." On cross-examination it was brought out that Turner previously had been convicted four times, and that he was then in jail awaiting sentence for five robberies, each of which could lead to imprisonment for up to twenty-five years. Turner testified that although no promise had been made by the state, he did expect some consideration in his sentencing as a result of his testimony.

petitioner's defense was an alibi, based on the testimony of his girl friend and two friends of his mother that petitioner was at his mother's house at the time the crime occurred, helping prepare for a party the next day. He also called Albert Cunningham as a defense witness. During the investigation of the murders, Cunningham had been questioned by an Assistant District Attorney

. **

4.

in the presence of two detectives, and had stated that he participated in the robbery with two persons named Branch and Green and a fourth whom he could not identify. Cunningham told the investigators that while the others went upstairs in the building he remained on the staircase; that when he heard a shot he ran from the building and left the area in a cab; and that he later met Branch who gave him \$200 which he guessed "was for that." Cunningham's oral answers, although reduced to writing, were neither signed nor sworn to by him. He was indicted for the murders and brought to trial alone. The confession was ruled admissible against him after a huntley hearing. ever, a mistrial was declared and the charges were dropoed when the presecutor decided that the alleged coafession was unreliable and that the wrong man was on trial.

Against that background, Cunningham was called as a defense vitaces. On direct examination by petitioner's counsel, Cunningham testified that he had been indicted and charged with the Natz marders and that before

⁽⁵⁾ Poplo v. Duntley, 15 N.Y.2d 72, 255 N.Y.S.2d 839, 204 N.B.2d 179 (1965).

his arrest and indictment he had had conversations with the Assistant District Attorney and the detectives When petitioner's counsel sought to (T. 1194-95). ask Cunningham what he had said at that time, the court sustained the prosecutor's objection. After sidebar discussion the trial judge indicated that he would permit defense coursel to interrogate Cunningham as to any part he or anybody else played in the murders, but not as to what Cunningham told others. The judge further ruled that if it appeared Cunningham was a hostile witness, that is, implicated Welcome or his co-defendants, cross-examination of Cunningham would be permitted as to his prior inconsistent statements to the Assistant District Attorney and others, even though such prior statements were not in writing (T. 1216 18).

Upon continued direct examination, Cunningham testified that he drove to the Bronz with Branch and Green and that they were armed with a shotgun and pistols. He testified that they robbed the Fatz brothers' real

⁽⁷⁾ References are to pages of the trial transcript as printed in the record of petitioner's direct appeal to the Appellate Division.

estate office but that he did not know if during the course of the holdup a shooting occurred (T. 1223-24). On cross-examination by the prosecutor, Cunningham retracted his prior testimony, stating that he misunderstood defense counsel and thought his questions referred to the confession --- a term, incidentally, volunteered He then categorically denied comby Cunningham. mitting the robbery, knowing anything about the crimes or even knowing the location of the Katz brothers' realty off .9 (T. 1225-28). On redirect, defense counsol, contending among other matters that Cunningham "nald there was a confession" and therefore "opened the door" (T. 1220-20), sought to question him about his oral stakements to the Assistant District Attorney and the detectives, to establish that these were inconsistent with the answers given on cross-examination. The court refused to allow the inquiry on the ground that Curningham's testimony had not inculpated Welcome or

⁽⁸⁾ he posecutor, during extensive sidebar discussion, expansized that he had never referred to or mentioned the word "confession," and the court observed that had the prosecutor moved to strike Cunningham's valunteered reference to it, he would have granted the notion (T. 1235).

his co-defendants and that his oral statements were inadmissible hearsay.

refusal to allow him to question Cunningham about the alleged confession deprived him of a fundamentally fair trial in violation of his right to due process of law. He gives three reasons why it was error to exclude Cunningham's statement: (1) because the prosecutor "opened the door" during cross-examination of Cunningham by asking a question which elicited a response referring to the confession; (2) because once Cunningham retracted the testimony be gave on direct examination, the defendant was entitled to impeach him despite the provisions of section 8-a of the former Code of Criminal procedure, permitting the use of prior inconsistent statements to impeach a party's can witness only when such statements were made under oath cr were in writing subscribed by the witness; and

^{(9) &}quot;In addition to impeachment in the manner new permitted by law, any party may introduce proof that a witness has made a prior statement inconsistent with his testimony, irrespective of the fact that the party has called the victoess or made the vitness his own, provided that such prior inconsistent statement was made in any writing by him subscribed or was made under oath." Secrios 8-a has been superceded by N.Y.C.P.L. 560.35.



Cunningham's penal interest. Assuming that petitioner is correct in those contentions, it does not follow that a writ of habeas corpus must be granted. The question presented on this application is not one of the law of evidence but one of constitutional dimensions, to be tested under the due process clause of the Fourteenth Amendment. Thus, at issue is not whether it was evidential error to foreclose petitioner from questioning Cunningham about his out-of-court statements, but whether that ruling deprived petitioner of his right to a fundamentally fair trial.

potitioner claims that Chambers v. Mississippi dictates a finding that he was denied due process. In Charbers the defendant, accused of murdering a police of-

⁽¹⁰⁾ United States ex rel. Holliday v. Adams, 443 F.2d 7, 8 n.1 (2d cir. 1971); United States ex rel. Sadowy v. Fay, 284 F.2d 426, 427 (2d cir. 1960), cert. denied, 365 U.S. 850 (1961); United States ex rel. Corby v. Conroy, 337 F.Supp. 517, 519 (S.D.N.Y. 1971); United States ex rel. Birch v. Pay, 190 F.Supp. 105, 107 (S.D.N.Y. 1961); see also Chambers v. Mississippi, 416 U.S. 201, 302-63 (1973); Dutton v. Evans, 400 U.S. 74, 80-83 (1970).

^{(11) 416} W.S. 204 (1973).

by a man named MacDonald. MacDonald had given a sworn statement to Chambers' attorneys stating that he and not Chambers had killed the policeman, but retracted the confession before Chambers' trial. At his trial, Chambers was allowed to introduce testimony from eyewitnesses linking MacDonald to the shooting, and to have MacDonald's sworn confession read to the jury. However, when MacDonald, who was called as a defense witness, repudiated his confession upon cross-examination, the court did not allow Chambers' attorney to cross-examine MacDonald as a hostile witness. The court further refused, on the grounds of hearsay, to allow Chambers to present testimony from three witnesses of other out-of-court confessions by MacDonald. The Supreme Court reversed Chambers' conviction.

Chambers did not establish a per se rula that
Failure to permit cross-examination of a witness about
prior statements which, by inculpating the witness, allegedly exculpate the defendant, invariably denies due
process. The Court held only that upon the particular
"facts and circumstances of this case," the combined
offect of all of the trial court's rulings was to deny
Chambers "a trial in accord with traditional and fundamental

standards of due process," because those rulings made Chambers' defense "far less persuasive" than it would have been had his opportunity to present evidence not Crucial to the Court's finding been restricted. that Chambers was denied due process were the persuacive indications that the hearsay statements offered were reliable. The confessions were volunteered spontaneously to friends within twenty-four hours of the crime; they were corroborated by eyewitness testimony, physical evidence and MacDonald's own sworn confession; they were clearly and devastatingly against MacDonald's penal interest; and MacDonald was present in court for cross-examination concerning the statements. In sum, the rejected evidence "bore persuasive assurances of urustworthiness."

petitioner claims that his inability to present Cunningham's confession to the jury similarly

^{(12) 410} U.S. at 294, 302-03. See Maness v. Wainwright, 512 F.2d 88, 90-91 (5th Cir.), rah. en banc granted, 510 F.2d 1085 (5th Cir. 1975), order for rehearing en banc vacated, 528 F.2d 1381 (5th Cir. 1976); cf. United States v. Jenkins, 496 F.2d 57, C9-70 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975).

^{(13) 410} U.S. at 300-02.

deprived him of a fair trial. He argues that the reliability of Cunningham's confession is shown in several
ways. First, as in Chambers, Cunningham's statement
was against his penal interest. Second, the state
believed in the reliability of the confession enough
to bring Cunningham to trial. Third, the confession
was ruled admissible against Cunningham in the Huntley
hearing.

unreliable are far more compelling. Not only was
Cunningham's unsworn confession uncorroborated by any
other evidence, but a mistrial was declared and the
prosecution against him was dropped for substantial and
compelling reasons. As explained to the trial court by
the District Attorney of Bronx County (T. 1244-46),
police investigation revealed that Branch and Green, the
two persons whom Cunningham named as committing the robbery with him, could not have done so since one was
out of state and the other in jail at the time. Cunningham
was given a polygraph tost which indicated he had nothing
to do with the robbery. In addition, when he made the
statement, according to the District Attorney, Cunningham

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and "would have admitted anything" (T. 1245-46).

The statement itself was vague and confused. Cunningham did not identify the building where the robbery took place, except to say that it was a "business type building" in the Bronx. Nor could he state on what day the robbery occurred. Shown a hat and a pair of glasses apparently found by police at the scene of the murders, Cunningham stated that they belonged to the fourth person, whose name he did not know. Finally, instead of being clearly against Cunningham's penal interest, the alleged confession contains no statement that he was present at or saw the shooting or that he actually committed a robbery. Unlike the statement in Chambers, therefore, Cunningham's statement does not persuasively appear to be trustworthy. Under these circumstances the court's refusal to allow examination of Cunningham as to his alloged complicity in the homicides did not impair petitioner's defense to such an extant as to deny him a fundamentally fair trial.

Politicaer's second claim rests on the recantation of Vincent Turner. Over two years after the trial Turner gave an oral statement to petitioner's actornay.

which was recorded and transcribed, and signed an affidavit. In those statements Turner said that his testimony relating his conversation with petitioner about
"them two studs" that petitioner "burnt" was perjured,
given at the behest of one of petitioner's co-defendants
who feared that petitioner would testify against him
and hoped that strong evidence against petitioner would
induce him not to do so.

while the fact that Turner has recanted does not establish that he actually committed perjury at the first trial, since such recantations are justly regarded (14) with great suspicion, the court will assume that Turner did commit perjury. However, that fact by itself does not require that the instant application be granted. Petitioner is entitled to a federal writ of habeas corpus voiding the state court judgment of conviction only upon a showing that the state contrived to deprive him of his right to a fair trial, protected under the due process

⁽¹⁴⁾ United States ex rel. Rice v. Vincent, 491 F.2d 1325, 1332 (2d Cir.), cert. denied, 419 U.S. 880 (1974); United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954); 800 also Phinehart v. Rhay, 440 F.2d 713, 721-23 (9th Cir.), cert. denied, 404 U.S. 825 (1971).

clause. The deprivation of that right is not established

by a mere showing that petitionar's conviction may have

been the result in part of perjury by a prosecution wit
ness, unknown to the prosecutor. It is the deliberate,

knowing, or even negligent use of false testimony by the

prosecution, or the suppression of evidence favorable to

the defendant, which so offends the "rudimentary demands

of justice" that it deprives an accused of his right to a

(15)

fair trial and taints his conviction. Accordingly, to

establish his claim that Turner's alleged perjury deprived

him of a fair trial, petitioner must show that prosecutorial

misconduct, whether by design or negligence, was implicated.

(16)

⁽¹⁵⁾ Giglio v. United States, 405 U.S. 150, 153-54 (1972); Brady v. Maryland, 373 U.S. 83, 86-87 (1963); Napue v. Illinois, 360 U.S. 264, 269 (1959); Mooney v. Holahan, 294 U.S. 103, 112-13 (1935).

denied, 423 U.S. 937 (1975); Elliott v. Beto, 474 F.2d 856, 857 (5th cir.), cert. denied, 411 U.S. 985 (1973); United States ex rel. Cantanzaro v. Mancusi, 404 F.2d 296 300 (2d cir. 1968), cert. denied, 397 U.S. 942 (1970); Luna v. Beto. 395 F.2d 35, 41 (5th cir. 1968), cert. denied, 394 U.S. 966 (1969) (Brown, J., concurring); Johnson v. Bennett, 386 F.2d 677, 679-80 (8th cir. 1967), vacated on other grounds, 393 U.S. 253 (1968); see also United States ex ral. Birch v. Fay, 190 F.Supp. 105, 107 (S.D.N.Y. 1961). Under certain circumstances, which may vary from case to case, however, newly discovered evidence that a judgment of conviction is based

Petitioner concedes that the prosecution had no knowledge of Turner's alleged perjury. However, he claims Turner was "induced to perjure himself and testify favorably for the Prosecution because of the expectation of leniency from the People in his own pending robbery cases," and that "since it was the bargaining practices of the People that induced Turner to perjure himself, the Prosecution, albeit lacking direct knowledge of the perjury, must still be held accountable."

This claim is without merit. To accept it would be effectively to foreclose the use of the testimony of informers, confederates or accomplices who are awaiting sentence or facing possible criminal charges. From time immemorial such testimony has been recognized as necessary (17) to secure the enforcement of criminal laws. It is

^{(16) (}cont'd.) in part upon material perjured testimony may warrant the granting of a motion for a new trial even when the prosecution was unaware of the perjury. See United States v. Rosner, 516 F.2d 269, 272 (2d Cir. 1975), cert. denied, 44 U.S.L.W. 3756 (U.S. June 30, 1976) (No. 75-492); United States v. DeSapio, 435 F.2d 272, 286 n.14 (2d Cir. 1970), cert. denied, 402 U.S. 999, 406 U.S. 933 (1971); United States v. Narquez, 363 F.Supp. 802, 805-06 (S.D.N.Y. 1973), affid without opinion, 490 F.2d 1383 (2d Cir.), cert. denied, 419 U.S. 825 (1974).

⁽¹⁷⁾ See Hoffa v. United States, 335 U.S. 293, 311 (1966); United States v. Dannis, 183 F.2d 201, 224 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951); Handschu v. Special Services Division, 349 F.Supp. 766, 769 (S.D.M.Y. 1972).

one thing to say that a defendant is entitled to all information relating to the credibility of a witness (18)and every opportunity to challenge his reliability. But it is quite another matter to suggest a virtual blackout of such evidence and to prevent its use by the prosecution. As long as the defense is afforded a full and fair opportunity to expose flaws in a witness' testimony, the motives he may have to testify falsely, and the other factors which touch upon his credibility, the requirement of due process of law is met. In this case, Turner's motives for fabrication (19) were exposed to the jury and argued at length by counsel. Petitioner has failed to show that knowing use of perjured testimony which constitutes a denial of due process.

⁽¹⁸⁾ See Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963).

⁽¹⁹⁾ In addition, it should be noted that Turner's recantation statement belies the factual basis for petitioner's argument. Turner stated that he perjured himself, not in the hope of getting a lighter sentence, but at the request of petitioner's co-defendant.

The petition for a writ of habeas corpus is

dismissed upon the merits.

Dated: New York, N.Y. September 2, 1976

United States District Judge

ERNEST WELCOME,

Petitioner,

Respondent.

United States Court Southern District of New York

Case No. 76-Civ 1562

LEON J. VINCENT, Superintendent, Greenhaven Correctional Facility,

Judge Weinfeld

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5/25/76	Filed Stipulation and order that the date for submission of papers by respondent shall be extended to 5/25/76 - Weinfeld, J.	3
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COURT OF APPEALS FOR THE SECOND CCIRCUIT

UNITED STATES OF AMERICA,
Petitioner- Appellant,

- against -

LEON J. VINCENT, XX XUPERINTENDENT, GREENHAVEN CORRECTIONAL FACILITY, Respondent.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

I. Reuben A. Shearer

depose and say that deponent is not a party to the action, is over 18 years of age and resides at

211 West 144th Street. New York. New York 10030

That on the day of Octber 19 76at Two World Trade Center, New York, New York

deponent served the annexed Brief

upon

Louis Lefkowitz

the Attorney in this action, by delivering a true copy thereof to said individual personally. Deponent knew the person we served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 28th day of October 19 76

Buth A thus,

* BETH A. HIRSH

NOTARY PUBLIC State of New York

190, 41-4023100

Qualitied and Quagna County

Commission Expires Staten Jul 1978

Reuben Shearer